

CHAPTER 3

NATIVE AMERICAN CULTURAL STUDIES

3-1 INTRODUCTION

The consideration of Native American concerns, ideas, beliefs and values in the development of Caltrans highway projects is an important part of the project development process. This chapter provides Caltrans policies and procedures for complying with various state and federal historic preservation laws, regulations, and guidelines that involve Native Americans. These policies ensure that

- Native Americans are involved in all aspects of identifying, evaluating and treating Native American historic properties (i.e., properties eligible for the National Register of Historic Places or are historical resources under CEQA because they meet the criteria for inclusion in California Register of Historical Resources) and
- Native Americans determine the treatment of Native American human remains, associated grave artifacts, and sacred objects that may be unearthed by Caltrans activities.

Also presented are Caltrans policies and procedures (a) for identifying and treating resources that are not eligible for the National Register, but are culturally significant, and (b) for providing Native American access to sacred sites and plant gathering areas located within Caltrans right of way. Although any group, ethnic or otherwise can be involved in the historic preservation or environmental process, Native Americans are singled out because of a historical fact — they were here when the EuroAmericans arrived and encroached upon their homelands. Their sacred and traditional places are tied to the landscape that we now inhabit.

Caltrans' historic preservation coordination efforts with Native Americans involves consultation with federally recognized tribes and California Indian traditional cultural leaders, unrecognized groups, and individuals on concerns they have regarding Caltrans' activities. Simultaneously, these efforts are also directed towards identifying other cultural concerns and areas of cultural significance that a proposed project may impact, and which need to be addressed under environmental law. Consultation includes efforts to protect areas important to Native Americans that may be unrecognized by people outside the culture, including sacred sites, plant-gathering areas, and historic properties referred to as traditional cultural places. Often the existence of such places are confidential, and their identification and management can therefore be prob-

lematic and sensitive. Caltrans, through its Environmental, Maintenance, and Right of Way Programs and Offices, seeks to ensure that Native Americans have access to such sites. Caltrans also seeks individuals to monitor archaeological excavations of prehistoric sites, and works per State law with Indians identified as Most Likely Descendents to develop appropriate treatment of the remains and associated grave artifacts if Native American human remains are discovered during any Caltrans activities.

3-2 BACKGROUND

California was home to more than 300,000 Indians at the beginning of Spanish colonization in 1769. These Native peoples composed at least 60 different tribes (**Figure 3-1.1**), and spoke as many as 80 languages that were differentiated into an indeterminable large number of dialects. Lifeways varied, closely paralleling the rich environmental resources of the state. Subsistence activities included the gathering of plant and animal foods, hunting, marine and fresh water fishing, as well as the collection of a variety of coastal resources. The relative abundance of natural resources allowed for a large Native population, as well as the development of an elaborate ceremonial, religious, and material culture.

Decline in Population

Like other Native people in the Western Hemisphere, the Indians of California declined following the entrance of EuroAmericans. Between 1770 and 1900 the Native population fell from 300,000 to 20,000, a decline of over 90% of their original population (Cook 1978:91). The collapse and social disruption of Native culture was due primarily to: (1) development of the Mission system (1769-1834), (2) the opening up of land for settlement after the 1848 War with Mexico, (3) the rapid influx of immigrants to California after the discovery of gold in 1848, and (4) exposure to devastating EuroAmerican diseases.

Statehood and Land Title

The 1848 Treaty of Guadalupe Hidalgo at the end of the war between the United States and Mexico did not include any provisions protecting Indian land title. The United States government initiated attempts to resolve this. However, once the Gold Rush was on and California became a state, the government became less inclined to pursue this issue and in actuality circumvented any fair resolution. Almost all California Indians were deprived of protected land title because they were not notified of a provision of the Lands Claim Act of 1851. This provision stated that all lands with invalid claims, or claims not presented in two years after the Act, would become public domain,

which is what happened to Indian lands in 1853. Lands of certain bands of Mission Indians were protected by early Spanish and Mexican land grants and retained by those bands (California Indian Legal Services 1993).

In 1852, the United States Senate refused to ratify 18 treaties previously negotiated with 139 chiefs or headmen of California tribes. The tribes were prevented from knowing of the refusal because the treaties were also placed under seal. The treaties would have established a land base for the California Indians and would have also conferred formal recognition of the tribes. In 1905, the public was informed of the 18 treaties.

Rancheria System

Between 1906 and 1910, funds were provided through a series of appropriation Acts to purchase small tracts of land in the central and northern parts of the state for the landless Indians in those areas, establishing the Rancheria System in California. Nearly fifty years later, the federal government attempted to terminate the status of 41 California rancherias under the Rancheria Act of 1958. Termination was a federal Indian policy in the 1950s and 1960s designed to end the tribes' special relationship with the federal government and to subject them to state laws. Tribal land was converted into private ownership, and in most instances sold (Canby 1988). In 1967, the newly established California Indian Legal Services sought to reverse through litigation the termination of the California rancherias. Twenty-eight of the 41 rancherias have since been restored (California Indian Legal Services 1993).

Advisory Council on California Indian Policy

This brief and incomplete synopsis of the federal government's policy towards California Indians provides a background to the situation today — that in addition to federally recognized land based tribes, there are many California Indian groups and individuals without a land base and/or without federal recognition. In 1994, the Advisory Council on California Indian Policy, composed of representatives of federally recognized, terminated and unacknowledged tribes was established by Public Law 102-416, for the expressed purpose of holding a series of statewide meetings to hear the special concerns of California Indians and to develop recommendations to Congress for ensuring that the needs of California Indians are being met. The Council issued its final reports and recommendations addressing the social, political, and economic status of California Indians to Congress in September 1997 (Advisory Council on California Indian Policy 1997).

Today, approximately 250,000 Native American, Eskimo and Aleut reside in California's 58 counties; perhaps half these numbers are Indians indigenous to California.

Many Indians living in urban areas were displaced from other states under the Bureau of Indian Affairs “relocation” program in the 1950s. Through this program, Indians received grant money to leave reservations and seek work in metropolitan centers, which had been perceived as a solution to the reservations’ high rate of unemployment.

California has 104 federally recognized tribes and over 45,000 federally recognized California Indians. The majority of Indian Trust Land, reservations, and rancherias are located in California’s Northwest region, the North Coast Ranges, and in the southern California desert region. An estimated 35,000 to 75,000 Indians in the State do not have federal recognition.

The Department of Housing and Community Development provides updates periodically of the *Field Directory of the California Indian Community* (Department of Housing and Community Development 1996). The Field Directory gives the location of each reservation and rancheria, including land holdings, population, type of tribal government and current representatives. It is also the source of the statistics provided above. The Cultural and Community Studies Office in Headquarters Division of Environmental Analysis will distribute updates of the Field Directory to the Districts, as they become available.

FIGURE 3-1 Map of Tribal Territories [to be added]

3-3 COORDINATION ROLES & RESPONSIBILITIES

3-3.1 CALTRANS – HEADQUARTERS AND DISTRICTS

Headquarters and each of the Districts have staff who are designated specifically to assist in the implementation of Caltrans’ Native American policies and to ensure that Caltrans complies with applicable federal and state laws and regulations concerning Native American cultural issues.

HEADQUARTERS

The Headquarters statewide Native American Coordinator (NAC) works in the Cultural and Community Studies Office (CCSO) in Headquarters. The NAC’s responsibilities are:

- 1) to assist the Districts on request in all interactions with the Native American Heritage Commission (NAHC), the Office of Historic Preservation (OHP) and all other public agencies, and

- 2) to provide direction to the Districts on Native American affairs, including transmittal of pertinent legislation and information as it becomes available.

DISTRICTS

Each District has a designated Native American Coordinator (DNAC) under the direction of the District Environmental Branch Chief (DEBC). The DNAC is responsible for ensuring that Native American consultation regarding cultural resources occurs and that documentation of contacts and consultation for cultural resources is included in environmental documents. Early and continuous coordination is emphasized. During the field reconnaissance and resource inventory stage of environmental studies, the DNAC solicits Native American concerns from available sources, as appropriate. The NAC will provide advice and assistance on request. The NAHC may be contacted directly by the DNAC.

NORTH AND CENTRAL REGION LIAISONS

The North and Central Regions have created additional avenues for establishing effective communications with Native Americans. Native American Liaison positions have been established in the Fresno office (District 6) of the Central Region (also includes Districts 5, 9, and 10) and in the Eureka office (District 1) of the North Region (also includes Districts 2 and 3). The liaisons assist the Regions' DNACs in their efforts to establish good working relations with the Native Americans in their districts, as well as assist Headquarters efforts to establish a government-to-government relationship with tribes.

3-3.2 NATIVE AMERICAN HERITAGE COMMISSION (NAHC)

The Native American Heritage Commission (NAHC) was established in 1976 by state statute to preserve and protect burial sites and other places of special cultural or spiritual significance to Native Americans. The Commission, its powers, duties, and responsibilities, are described in Chapter 1.75 of the Public Resources Code (PRC), [Sections 5097.91-5097.99](#). Under PRC §5097.95, each state and local agency is to cooperate with the Commission in carrying out its duties under this chapter. Caltrans works cooperatively with the NAHC concerning all Caltrans property and projects that may involve burial sites or elements of cultural or religious significance to Native Americans.

The NAHC consists of nine members, of which at least five Commissioners are elders, traditional people or spiritual leaders. Members are nominated by a Native American organization, tribe or group, and are appointed by the Governor with the advice and consent of the Senate. The Governor appoints the Commission's Executive Secretary. A major responsibility of the NAHC is to

identify and maintain a catalogue of places of special religious or social significance to Native Americans, and of known gravesites and cemeteries of Native Americans on private lands.

NAHC AUTHORITY AND RESPONSIBILITIES

The NAHC's legal authority includes making recommendations to encourage private property owners to protect and preserve sacred places in a natural state and to allow appropriate access to Native Americans for ceremonial or spiritual activities. The NAHC is authorized to assist Native Americans in obtaining appropriate access to sacred places on public lands and to **aid state agencies in any negotiations with federal agencies** for the protection of Native American sacred places on federally administered lands in California.

Other major responsibilities of the NAHC include assisting landowners and Native Americans in developing agreements or mediating disputes regarding the respectful treatment and disposition of Native American human burials, skeletal remains and associated grave artifacts, and **designating a Most Likely Descendent when Native American human remains are discovered** (see Section 3-4.3, this chapter).

3-3.3 STATE OFFICE OF HISTORIC PRESERVATION (OHP)

The OHP Native American Heritage Coordinator, in consultation with the Federal Highway Administration (FHWA), is responsible for ensuring that Caltrans' Historic Property Survey Reports (HPSR) and subsequent Section 106 documents under review include documentation that demonstrates effective Native American coordination.

3-3.4 TRIBAL HISTORIC PRESERVATION OFFICE (THPO)

The 1992 Amendments to the National Historic Preservation Act provide for a tribe to assume all or any part of the specified functions of the State Historic Preservation Office (SHPO) if certain criteria are met with respect to tribal lands (Section 101(d)(2)).

SHPO functions that a tribe may undertake include advising and assisting federal and state agencies in carrying out their historic preservation responsibilities. Procedures for tribal programs will eventually be outlined in 36 CFR §61.8 and §61.9, currently reserved sections in the proposed revision of 36 CFR §61 as published in the October 2, 1996 *Federal Register*.

Tribal lands are all land within the exterior boundaries of any Indian reservation and all dependent Indian communities.

YUROK THPO

On August 5, 1996, the Yurok Tribe was granted SHPO status by the Secretary of the Interior. Caltrans will consult under Section 106 with the Yurok Tribe on all properties, both Yurok and non-Yurok, on and within the boundaries of the Yurok Reservation. This review will also suffice for consideration of historical resources under California State law on federally funded projects.

3-3.5 BUREAU OF INDIAN AFFAIRS (BIA)

When an archaeological investigation is planned on a federally recognized reservation or rancheria, the BIA may become involved, and Native American matters may be coordinated through that office. Reservations and rancherias however, have the option of adopting their own regulations that may not require BIA involvement. **The BIA will issue any Archaeological Resources Protection Act (ARPA) permits needed for any planned archaeological excavation or inadvertent discovery of human remains** as provided for under the Native American Graves Protection and Repatriation Act (NAGPRA) on non-tribal land within the exterior boundaries of a reservation or rancheria.

3-3.6 MOST LIKELY DESCENDENTS

When the NAHC is contacted by a county coroner upon the discovery of human remains likely to be Native American, the NAHC designates a Most Likely Descendent, or a person or persons believed to be the most likely descended from the deceased, **Caltrans confers with the Most Likely Descendent on the respectful treatment and disposition of remains** discovered during any of its activities.

3-3.7 TRADITIONAL CULTURAL LEADERS

Traditional cultural leaders are Native Americans that are acknowledged by their tribe, group, or community as having traditional knowledge of their culture. Traditional cultural leaders are consulted regarding areas and resources of concern to them.

3-3.8 FEDERALLY RECOGNIZED TRIBES

Tribes acknowledged by the federal government to have a government-to-government relationship with the United States and have specific responsibilities, powers, limitations and obligations, are referred to as federally recognized tribes. Federal agencies must consult with these Indian tribes regarding properties of traditional religious and cultural importance. A list of federally rec-

ognized tribes is periodically provided in the [Federal Register](#), the last notice appeared in the Wednesday, November 13, 1996 issue. Tribes without this status can petition the Bureau of Indian Affairs to be acknowledged as a federally recognized tribe, a process that has shown to be long, arduous, and expensive.

3-3.9 CONSULTING PARTIES

The State Historic Preservation Officer, Indian tribes, local governments and applicants for federal assistance, permits, licenses, and other approvals are entitled to actively participate as consulting parties during Section 106 review. Other individuals and organizations with a demonstrated interest in the project may participate in Section 106 review as consulting parties "due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." Their participation is subject to approval by the responsible federal agency.

3-3.10 NATIVE AMERICAN MONITOR

The Native American Monitor is a liaison between Caltrans and the local Native American community with whom Caltrans may contract on a project by project basis to participate and obtain first hand knowledge of archaeological surveys, excavations, and construction in areas of potential or known cultural sensitivity to Native Americans. The Native American Monitor should be knowledgeable about his or her culture and its traditions, and be familiar with archaeological practices, federal and state laws, and regulations regarding Native American cultural concerns.

3-4 LAWS, REGULATIONS, AND GUIDANCE

Caltrans is routinely involved with activities that may occasionally threaten or accidentally expose, or encroach upon archaeological and other resources of cultural value to Native Americans. Understandably, the discovery of human remains is a particularly sensitive concern to Native people. Responsive to State law, Caltrans practices are compatible with current federal laws and guidance on handling burials. This section summarizes the federal and state laws specifically as they relate to Native American concerns.

3-4.1 FEDERAL LAWS AND REGULATIONS

NATIONAL HISTORIC PRESERVATION ACT AS AMENDED THROUGH 1992

The 1992 amendments to the National Historic Preservation Act (NHPA) enhance the recognition of tribal governments' roles in the national historic preservation program, including adding a member of an Indian tribe or Native Hawaiian organization on the Advisory Council on Historic Preservation (ACHP).

The NHPA amendments

- clarify that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for the National Register;
- reinforce the provisions of the Council's regulations requiring the agency to consult with Indian tribes on properties of religious and cultural importance; and
- extend these provisions to Native Hawaiian organizations.

The 1992 amendments also specify that the ACHP can enter into agreement with tribes that permit undertakings on tribal land to be reviewed under tribal regulations governing Section 106, a provision similar to allowing federal agencies to develop their own counterpart regulations noted in 36 CFR §800.15.

Regulations implementing the NHPA (36 CFR §800) state that a federal agency (FHWA and Caltrans acting on its behalf) must consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by an undertaking, **regardless of location**. For any undertakings occurring on or affecting historic properties on tribal lands, the THPO, or if a THPO is not designated, the tribal representative, are signatories, along with FHWA, and if participating, the SHPO and/or the ACHP, to any Section 106 Memorandum of Agreement.

SECTION 4(F) OF THE 1966 DEPARTMENT OF TRANSPORTATION ACT

Section 4(f) applies to historic properties that are listed or determined eligible for listing in National Register, which would include any properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are National Register listed or eligible. See Chapter 2, Section 2-4.8 for a discussion of Section 4(f).

NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Quality Act (NEPA) requires agencies to consider both positive and negative effects of their actions on the environment, includ-

ing consideration of the broader cultural environment beyond historic properties and beyond place. This includes consideration of social cohesion, relation of community to patterns of local land use, social institutions, behavior, community values, lifeways, and beliefs and would include Native American concerns in these categories.

ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979

The Archaeological Resources Protection Act of 1979 (ARPA) and implementing regulations requires land holding federal agencies to notify federally recognized Indian tribes before a permit is issued for the archaeological excavation of sites of religious or cultural importance to them in national parks, wildlife refuges, or forests, or on Indian lands.

Federally recognized tribes must be notified 30 days before the issuance of a permit for excavations on public land, and on Indian lands, the consent of the Indian tribe or individual must be obtained before the permit is granted.

Uniform rules and regulations were published by the Departments of the Interior (43 CFR §7), Agriculture (36 CFR §296), and Defense (32 CFR §229), and the Tennessee Valley Authority (18 CFR §1313) in the January 6, 1984 *Federal Register*. The Federal land manager is to meet, upon request, with the Indian tribe or group in that 30 days to discuss their concerns.

The regulations also state that the federal agency may also notify any other Native American group that is known by the agency to consider the sites to be of cultural or religious importance. The intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from federal lands and tribal lands must follow both the requirements of ARPA and NAGPRA. The Bureau of Indian Affairs will issue any ARPA permits needed for excavation on private lands within the exterior boundaries of Indian reservations. Caltrans must obtain the appropriate permits whenever excavation is planned on federal or Indian Lands.

THE NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT OF 1990

The Native American Graves Protection and Repatriation Act (NAGPRA) became effective November 16, 1990. NAGPRA addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains and certain cultural items with which they are affiliated. The Act directs federal agencies and museums to identify, in consultation with Native Americans, the cultural affiliation of Native American human

remains and associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in holdings or collections under their possession (i.e., physical custody) or control (i.e., having sufficient legal interest). Ultimately, the intent is to repatriate the human remains and other cultural items to the appropriate lineal descendants or tribe.

RIGHT TO OWNERSHIP

The Act also statutorily establishes Native American right to ownership of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony which are excavated or discovered on Federal or tribal lands after November 16, 1990. A Review Committee, also established by the Act, determines the disposition of either unclaimed or unaffiliated human remains or cultural items, and reviews disputed claims. The committee includes three Native Americans, three scientific/museum representatives, and one general member. The legislation forbids the participation of federal employees on the committee.

NAGPRA REGULATIONS

The regulations ([43 CFR 10 §10](#)) for carrying out the Act were published in the *Federal Register* on December 4, 1995. The regulations establish definitions and the consultation procedures for lineal descendants, Indian tribes, Native Hawaiian organizations, museums and Federal agencies to follow to carry out the Act. “[Draft Recommendations](#) Regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects” were published in the *Federal Register* on August 20, 1996.

NAGPRA only applies to FHWA when a Federal-aid project is located on tribal or Federal lands. Since FHWA does not control or possess any collections, the repatriation provisions of NAGPRA for collections obtained prior to 1990 do not apply to FHWA. Caltrans, however, is working with universities on repatriation of human remains and associated items recovered from collections generated by Caltrans activities. Most of the collections with human remains are those obtained prior to 1976. After 1976, Caltrans worked with Most Likely Descendants pursuant to California law on the respectful treatment and disposition of human remains. For on-going or future projects, FHWA will reimburse costs associated with inventory, identification, and repatriation as an environmental mitigation expense.

JOINT RESOLUTION ON AMERICAN INDIAN RELIGIOUS FREEDOM

In 1978, the U. S. Senate and House of Representatives recognized that the passage of laws meant to conserve and preserve natural species and resources

unintentionally impinged on the free exercise of religion for Native Americans. These otherwise “worthwhile” laws limited Native Americans’ access to sacred sites and prohibited the use and possession of sacred objects necessary to practice their religion. The House and Senate passed a joint resolution which states that, “. . . henceforth, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites”. The resolution also states that the President directs federal departments and agencies to evaluate their policies and procedures in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious rights and practices.

From this joint resolution, came the American Indian Religious Freedom Act of 1978 ([AIRFA](#)) [P.L. 95-341 and Amendments of 1994 P.L. 103-334] which states, “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

The effect this federal legislation has had on Caltrans is minimal, since it basically duplicates the provisions of PRC Section §5097.9, discussed in Article 3-4.3 **California State Law** of this chapter.

EXECUTIVE ORDER 12898 – FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (1994)

This [Executive Order 12898](#) directs federal agencies to develop an agency-wide environmental justice strategy that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The Executive Order (E.O.) created an Interagency Working Group to offer consistent guidance to federal agencies in developing the administration, interpretation, enforcement, and research of an environmental justice strategy to encourage cooperation and coordination among the agencies conducting research, and to hold public meetings for the purpose of fact finding, receiving public comments, and conducting inquiries concerning environmental justice. The E.O. directs federal agencies to use existing data systems and develop cooperative agreements with state, local, and tribal governments in order to share information and to avoid unnecessary duplication of efforts.

Consultation and coordination with federally recognized Indian Tribes on issues addressed in the E.O. is also required.

EXECUTIVE ORDER 13007 - INDIAN SACRED SITES

President Clinton signed [E.O. 13007](#) on May 24, 1996, ordering federal agencies managing federal lands to implement procedures to

- accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners,
- to avoid adversely affecting the physical integrity of such sacred sites, and
- to ensure that reasonable notice is provided of any proposed action that may restrict future access or use or could adversely affect the sites.

The agencies were to report to the President any necessary changes to facilitate meeting these requirements and any procedures identified to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to adverse agency action on such sites on Federal lands. The E. O. affirms the Executive Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments." The definition of a sacred site as a "narrowly delineated", i.e., small, bounded location, and requirement that a tribe or an individual tells the land agency about the site are two elements in the Executive Order that are considered problematic. See also the ACHP's publication, "[The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106.](#)" This is discussed further under Section 3-5.7, **Confidentiality**.

3-4.2 FEDERAL GUIDELINES RELATING TO NATIVE AMERICANS

On January 11, 2001 revised Section 106 regulations took effect. The Advisory Council on Historic Preservation's Section 106 guidance material following is based on previous regulation but is still generally relevant when assessing a federal undertakings impact on historic properties. When available, a summary of guidance issued for the January 11, 2001 will supplant the following.

ADVISORY COUNCIL ON HISTORIC PRESERVATION GUIDANCE

Section 106 Participation by Indian Tribes and Other Native Americans (1988)

This fact sheet, based on the 1986 version of the regulations, specifies how Indian tribes, traditional cultural leaders, and other Native American groups are

provided the opportunity to participate in the Section 106 review of federal undertakings. The fact sheet also notes that the regulations encourage federal agencies, SHPOs, and the ACHP itself, to be sensitive and sympathetic to the special concerns of Indian tribes in historic preservation issues on and off Indian lands.

Regulation definitions singled out include definitions of **Indian lands, Indian tribe, Interested Persons**, and **State Historic Preservation Officer**. Terms not defined in the regulations, but clarified in the Council's Fact Sheet, *Section 106*, Step-by-Step, and repeated here include **other Native American, Section 106 review**, and **traditional cultural leader**. In general, the regulations require federal agencies to seek information from tribes and interested persons that are likely to have knowledge or concerns with historic properties in the area, and are to inform the tribes and interested persons consulted of the agency's determinations of eligibility and effect.

If a tribe has established formal historic preservation procedures for activities on Indian land as well as on non-Indian land of importance to them, compliance with Section 106 should, to the extent feasible, be consistent with those procedures. Tribes can also be a Tribal Historic Preservation Officer (THPO) with complete or partial Section 106 responsibilities. Tribes may wish to establish standing agreements with agencies and SHPOs that specify how the tribe can be consulted with respect to particular areas, properties, property types, or undertakings. When an undertaking affects Indian lands, the Federal agency is to invite the tribe to consult and concur in any agreement. The tribe and other Native American groups can also be invited to be consulting parties on non-Indian land.

Public Participation in Section 106 Review: A Guide for Agency Officials (1989)

The Public Participation in Section 106 Review guide is based on the 1986 version of the regulations, but is still relevant. It reiterates the distinction between "interested persons" and the general public and encourages coordinating public participation in Section 106 review with public participation procedures established under NEPA or other pertinent statute.

The general principles of public participation are that it is supportive of historic preservation objectives, recognizes that both agency and the public have responsibilities, **encourages a flexible approach**, and is commensurate with the scale and type of undertaking involved, its potential effect, the likelihood of historic properties to be present, and the kinds of public interest present. In the guidance on making documentation available to the public, the issue of confidentiality is discussed.

The “interested persons” sections are particularly relevant to the involvement of Indians in the Section 106 review process. The regulations require agencies to seek information from parties that are likely to have knowledge or concerns with historic properties in the area, particularly during the identification and evaluation phases. Interested persons are also consulted regarding a project’s effect findings as well as ways to resolve adverse effects. See Chapter 2 and *Section 106*, [Step-by-Step](#) for further information.

Treatment of Archaeological Properties, A Handbook (Part II, Section IV and Part III, Section XII) [1981]

In the review of projects involving archaeological properties, the ACHP ensures that all due consideration is given for any non-archaeological historical or cultural values the property may represent. For example, if an archaeological property is also valuable to a local community for cultural reasons, appropriate weight to this value will be given in decision making (Part II, Section IV). This guidance also notes that archaeological excavations should “relate positively to non-archaeological concern with the area and its archaeological properties,” including religious and other cultural concerns of Native Americans (Part III, Section XII). Directly impacting a site is an adverse effect that often is mitigated by data recovery. Part II, Section X outlines under what circumstances a data recovery program could result in a finding of No Adverse Effect and under what circumstances such a finding would not be appropriate. This last finding includes situations where the property is “known or thought to have historic, cultural, or religious significance to a community, neighborhood, or social or ethnic group that would be impaired by its disturbance” (B)(3)(d). Part III, Section X underscores the need to make a systematic effort to find and consult with appropriate representatives when a demonstrable ethnic affinity exists between recovered human remains and living groups.

Section 106 Regulations User Guide: Consulting with Indian Tribes in the Section 106 Review Process (1999)

[Consulting with Indian Tribes in the Section 106 Review Process](#) outlines the specific provisions incorporated into the June 17, 1999 revised Section 106 regulations for federal agencies (FHWA and Caltrans acting on its behalf) to involve Indian tribes when actions occur, or affect historic properties, on tribal lands, and for consulting with Indian tribes, on and off tribal lands, throughout the Section 106 process. It has not yet been updated to reflect the January 11, 2001 regulations. It is anticipated that the main change will be a distinction of the roles of Indian tribes that have assumed the responsibility of SHPO on their tribal lands (i.e., THPOs) from that of tribes that have not.

The guidance proceeds to outline the role of Indian tribes in the initiation of the Section 106 process, in the identification and evaluation of historic proper-

ties, and in the assessment and resolution of adverse effects. The FHWA must consult with the tribe on all findings, and in the resolution of adverse effects. The tribe can request the ACHP to review any of the FHWA's findings, or to participate in consultation in the resolution of adverse effects. The involvement of tribes in the development of program alternatives is also outlined.

**Protecting Historic Properties:
A Citizen's Guide to Section 106
Review (2001)**

This [Citizen's Guide](#) is based on the January 11, 2001 regulations and explains the Section 106 review process, who and what is involved, and how citizens can involve themselves in the review, and influence decisions about Federal projects that affect properties they value.

Key points of this User's Guide

- ❖ The agency must make a reasonable and good faith effort to identify tribes to be consulted,
- ❖ Historic properties of religious and cultural significance may be located on ancestral, aboriginal or ceded lands of Indian tribes, and
- ❖ The agency must consult with any Indian tribe that may attach religious and cultural significance to a historic property regardless of its location,
- ❖ Consultation must be respectful of tribal sovereignty and is conducted in recognition of the government-to-government relationship.

The guidance explains the process for becoming a "consulting party," other than those specifically named in the regulations, namely the SHPO, THPO, tribes, local governments, and applicants for federal assistance, permits, licenses, and other approvals. As noted earlier in this chapter, other individuals and organizations with a demonstrated interest in the project may participate in Section 106 review as consulting parties "due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties."

The FHWA, in consultation with the SHPO, and if on tribal land, in consultation with the THPO or tribe, decides who will be a consulting party. How to contact the ACHP and what to do when an agency is out of compliance with Section 106 is also included in the guide.

FEDERAL HIGHWAY ADMINISTRATION GUIDANCE

Federal Highway Administration – Guidance on Relations with American Indian Tribal Governments (Indian Task Force Report – February 4, 1998)
(to be inserted)

NATIONAL PARK SERVICE GUIDANCE

The National Park Service has many publications that are relevant to cultural resources studies. Most of the publications listed below are available on-line.

Archaeology and Historic Preservation: Secretary of the Interior's Guidelines for Archeological Documentation

The [Archaeology and Historic Preservation Standards and Guidelines](#) stress that archaeological documentation needs to be “responsive to the concerns of local groups (e.g., Native American groups with ties to specific properties).” Archaeological research designs should provide for appropriate ethnographic research and consultation and should consider concerns expressed previously during identification and evaluation phases. If coordination with local or other interested groups had not previously occurred, the research design “should anticipate the need to initiate appropriate contacts and provide a mechanism for responding to sensitive issues, such as the possible uncovering of human remains or discovery of sacred areas.”

These guidelines can also be found in the *Federal Register*, vol. 48, No. 190, Thursday, September 29, 1983, pp. 44734-44737.

National Register Bulletin 15: Guidelines for Applying the National Register Criteria for Evaluation Bulletin 15 (Revised 1991)

[National Register Bulletin 15](#) contains guidance for assessing significance and integrity when evaluating a cultural resource’s National Register eligibility. Prehistoric archaeological sites are most often eligible for listing in the National Register under Criterion D (information potential). Archaeological sites and other places significant to Native Americans can also be found eligible for listing under any of the other four criteria. For example, properties may have significance under Criterion A if they are associated with events, or series of events, significant to the cultural traditions of the community, under Criterion B if they are associated with individual Native Americans who made a specific important contribution to history or important mythological figures, or under Criterion C if the property demonstrates distinctive characteristics of a type, period or method of construction or possesses high artistic values, such as a petroglyph or pictograph site.

Religious properties [Criteria Consideration (a)] are usually not considered for listing in the National Register to avoid any “judgment by government about the validity of any religion or belief.” These properties can be eligible for listing, however, if they meet the requirements of Criteria Consideration (a), given in Bulletin 15, in addition to meeting one of the four National Register Criteria and possessing integrity.

A Native American religious property can be eligible under Criterion A (Events) if it is significantly associated with traditional cultural values. A property or natural feature important to a traditional culture's religion and mythology is eligible if its importance has been ethnohistorically documented and if the associations are not so diffuse that the physical resource cannot be defined adequately. An example of this type of historic resource could be a natural feature from which a particular group is believed to have originated. Another criterion for which a Native American religious site could be eligible is association with a person important in religious history (Criterion B), if that significance has scholarly, secular recognition, or is important in other historic context, or if it can yield important information about the religious practices of a cultural group or other historic themes. Other Criteria Considerations, as listed in Bulletin 15, could also apply to places significant to Native Americans. Please refer to Bulletins 15 and 38 (mentioned below) for further discussion.

National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties

[National Register Bulletin 38](#) contains guidance for assessing significance in a historic property type called a Traditional Cultural Property or Place (TCP). Many Native Americans prefer "place" because "property" connotes ownership, a concept that is often antithetical to cultural beliefs. A TCP is generally defined as a place that is eligible for inclusion in the National Register because it is associated with cultural practices or beliefs that are rooted in a community's history, and are important in maintaining the cultural identity of that community. TCPS are associated with any kind of community: ethnic (e.g., a Jewish community in Florida), religious (e.g., Mormons), etc. Most identified to date are Native American sacred sites.

Often the community can only identify a TCP, or by certain members of the community, that ascribe significance to it, as there are often no associated physical characteristics that can be identified by the uninitiated.

A TCP must be a place, i.e., a physical location. Although intangible attributes are considered, purely intangible attributes are not TCPs. Evaluating and assessing the integrity of a TCP involves looking at the property through the eyes of the community that values it; it is not an academic judgement. The presence of a TCP does not need to be known prior to efforts to identify historic properties, since factors such as private acquisition,

A TCP is eligible for the National Register if

- ❖ it meets at least one of the four evaluation criteria;
- ❖ has integrity; and
- ❖ is at least 50 years old.

acculturation, or colonization might have restricted access to and knowledge of such places through time. Field visits may jog memories resulting in the identification of a place that meets the definition of a TCP.

A place that is not eligible for the National Register as a TCP may still be a place with cultural significance ascribed to it by a community and would be considered under other laws, such as NEPA or California Public Resources Code §5097.9. Intangible values such as religious values and lifeways still require consideration under other statutes, such as AIRFA.

Executive Memorandum of April 29, 1994, Government-to-Government relations with Native American Tribal Governments

This [April 1994 Memorandum](#) offers guidance to executive departments and agencies to ensure that they operate within a government-to-government relationship with federally recognized Native American tribes. Executive departments and agencies are to consult openly and candidly, in a “knowledgeable, sensitive manner respectful of tribal sovereignty” with tribal governments on proposed actions that affect tribal rights or trust resources and ensure that the tribes’ rights and concerns are considered during the development of such plans, projects, programs, and activities. The Executive departments and agencies are to work cooperatively with each other to accomplish the memorandum’s goals, remove impediments to accomplishing the goals, and design solutions and tailor programs to address specific or unique needs of tribal communities.

3-4.3 CALIFORNIA STATE LAW

Public Resources Code §5097.9

The primary California State Law guiding Caltrans Native American policies and practices is Chapter 1.75 of the Public Resources Code, [§5097.9-5097.991](#), *Native American Historical, Cultural and Sacred Sites*. This law discusses the Native American Heritage Commission and its power, roles and responsibilities, mentioned earlier in the chapter. It also requires cooperation of state and local agencies with the Commission in carrying out its duties and prohibits a public agency from interfering with the free expression or exercise of Native American religion or causing severe or irreparable damage to any Native American “sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine” unless shown to be necessary for the public interest. The NAHC has the power to bring an action against a public agency if it appears that these prohibitions are or will be unmet.

It is an unfortunate convergence of facts that Native American burials are often

unmarked and thus disturbed during earth moving activities. Activities frequently undertaken by Caltrans are restricted in location so that avoidance of burials is difficult if not impossible. In the event that human remains, including isolated, disarticulated bones or fragments, are discovered during any Caltrans activity, whether it is during maintenance, construction, or an archaeological excavation, certain steps must be taken, following the provisions of Health and Safety Code §7050.5 and PRC §5097.98, and/or PRC §5097.94 as provided below.

It is a felony to obtain or possess Native American artifacts or human remains from a grave or cairn except as otherwise provided by law or in accordance with an agreement reached pursuant to PRC §5097.94 or PRC §5097.98.

Health and Safety Code §7050.5

If any human remains are exposed, [Health and Safety Code §7050.5](#) requires that no further excavation or disturbance occurs in the area and that the county coroner is called so that the coroner can verify that the remains are not subject to medical jurisprudence. Within 24 hours of notification, the coroner calls the NAHC if the remains are known to be or thought to be Native American.

PRC §5097.98

Under [PRC §5097.98](#), the NAHC designates immediately a person or persons it believes to be the most likely descended from the deceased. Within 24 hours of being notified, this person may, with the permission of the property owner, inspect the remains. The Most Likely Descendant also recommends means for treating and disposing with appropriate dignity, the human remains and associated items. If the NAHC does not identify the descendent, or the descendent does not make a recommendation, or the landowner does not accept the recommendation, and any mediation attempted fails to provide the landowner acceptable measures, the landowner is to reinter the remains on the property in an area not subject to further disturbance.

PRC §5097.94

The NAHC also should assist landowners in developing agreements with appropriate Native American groups for the respectful treatment and disposition of human remains. If such an agreement is desirable, the NAHC will provide a list of all Most Likely Descendants to be consulted regarding the agreement. All the Most Likely Descendants attest to this agreement by affixing their signatures to it. In the absence of such an agreement, the NAHC designates a Most Likely Descendant after the remains are discovered, and the steps outlined in PRC Section §5097.98 are followed.

PRC §5099.991

[PRC §5097.991](#) *Repatriation of Native American remains and associated grave artifacts* simply states that “**It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.**”

Caltrans is in the process of repatriating human remains and associated items found in its curated collections. Since the mid 1970s, the wishes of the Most Likely Descendents for the treatment and disposition of human remains and associated burial items have been followed, and repatriation is not an issue.

Health and Safety Code §7054(c)

This law, which states that any person who deposits human remains in any place other than a cemetery is guilty of a misdemeanor, does not apply to the reburial of Native American human remains under an agreement between the landowner and the Most Likely Descendent developed pursuant to PRC §5097.94(l) or under PRC §5097.98.

3-4.4 LOCAL GOVERNMENTS AND ORDINANCES

Under Section 106 regulations, Caltrans is required to consult with local governments regarding historic properties ([36 CFR §800.4 \(a\)\(1\)\(iii\)](#)). Consultation on findings of adverse effects requires that the head of a local government be included (for example, the mayor of a city, the chief executive of a county government, or his/her designee) when the affected historic properties are within the local government's jurisdiction ([36 CFR §800.5\(e\)\(1\)\(i\)](#)).

In addition, several California counties and some cities have adopted local ordinances protecting Native American resources. These include Humboldt, Inyo, Marin, Mendocino, Napa, Santa Barbara, Santa Clara, and San Joaquin counties.

3-5 CALTRANS NATIVE AMERICAN POLICIES

Caltrans cultural resources policy is to exercise all practical means to avoid, and if avoidance is not possible, to minimize adverse effects of transportation projects upon significant cultural resources. It is also Caltrans policy to avoid, or minimize, adverse effects to resources identified as important to the Native American community that may not be eligible for the National Register but are important to maintaining

Districts should work towards establishing an on-going relationship with Indian tribes, as well as other Indian groups and individuals, with cultural concerns in their districts.

the Native American culture. Such resources include plant or other gathering locations

Pursuant to the NHPA and Section 106 regulations, Caltrans consults with Indian tribes, other Native American groups and individuals, and traditional cultural leaders who are likely to have knowledge or concerns with historic properties in Caltrans right-of-way. Under PRC §5097, Caltrans works with the Native American Heritage Commission in its efforts to protect sacred sites, ensure Native Californians access to sacred sites, and provide for the respectful treatment of human remains and associated grave artifacts. FHWA and Caltrans also ensure that the appropriate Native Americans are consulted concerning sacred items or items of cultural patrimony as provided for in part by NAGPRA, prior to curating an archaeological collection. FHWA and Caltrans also ensure that Indian tribes and other Native Americans as appropriate are consulted per NAGPRA for excavations on federal or tribal lands. Caltrans policy is based on these laws.

To implement these policies, at minimum, efforts to identify Native American concerns are conducted early in the planning stages of a project to ensure that Native American cultural values are considered.

Caltrans policy regarding different aspects of Native American involvement is outlined below according to subject. Implementation of these policies is addressed in Section 3-6, **Procedures**.

3-5.1 CONSULTATION

It is Caltrans policy to consult with Indian tribes and other Native American groups and individuals on any proposed Caltrans project that may potentially affect historic properties or “cultural resources of interest to Native Americans.” Historic properties are those properties that are listed in have been determined eligible for listing in the National Register of Historic Places. Historical resources under CEQA are resources that meet the criteria for inclusion in the California Register of Historical Resources. “Cultural resources of interest to Native American” include resources that may not be eligible for listing on either register but are important to Native Americans in maintaining their culture. A location where plants used for food, basket materials, or medicinal purposes are gathered is an example of such a resource. The project area may be of known archaeological or Native American cultural sensitivity; however, the lack of known resources does not supersede the need for consultation.

Cultural Studies personnel are encouraged to establish long term relationships with Indian tribes, groups, and individuals to establish mutual trust, provide for effective and efficient communication, and to better address concerns regarding projects, particularly those with short time frames.

Consultation with Native Americans begins early in, and continues throughout, the life of the project.

3-5.2 MONITORS

It is Caltrans policy to solicit the services of a Native American Monitor for

- archaeological surveys of areas of high cultural sensitivity, such as burial grounds, sacred or ceremonial areas, or where Native Americans have expressed a strong concern for cultural resources.
- all Caltrans excavations, including Extended Phase I, Phase II and Phase III studies.
- construction activities where the presence of resources of concern to Native Americans has been identified and a commitment has been made for a Native American to monitor during ground-disturbing activities.

3-5.3 HUMAN REMAINS/ASSOCIATED ARTIFACTS

Caltrans complies with provisions of NAGPRA on federal or tribal lands regarding the treatment and disposition of human remains and associated grave artifacts when encountered during the course of an archaeological excavation or any ground disturbing activity. Pursuant to PRC §5097.98, Caltrans also complies with the recommendations of the Most Likely Descendent per PRC §5097.98 regarding the treatment and disposition of human remains and associated grave artifacts when encountered during the course of an archaeological excavation or any ground disturbing activity on state lands.

The Native American Heritage Commission (NAHC) maintains a Sacred Lands Inventory. All burials and reburials must be recorded on the Sacred Lands Inventory Form (**Exhibit** ___ to be inserted later) and the form is submitted to the NAHC.

3-5.4 SACRED ITEMS/ITEMS OF CULTURAL PATRIMONY

Caltrans will follow the provisions of NAGPRA regarding the treatment of sacred items or items of cultural patrimony.

3-5.5 AVOIDANCE OF TRADITIONAL CULTURAL PROPERTIES

Where feasible, it is Caltrans policy to avoid cultural resources that are of value to Native Americans. Caltrans will make every effort to avoid burial areas, as well as sacred, religious or ceremonial sites. Where such sites cannot be avoided, Caltrans must identify Native American concerns, and reach agree-

ment on the appropriate treatment.

3-5.6 ACCESS TO SACRED SITES; GATHERING SITES

The NAHC 1979 report to the Legislature succinctly stated "Equally important (as burials) to California Indians are those places of traditional, spiritual or social importance (such as prayer sites, ceremonial sites and shrines), areas important in folklore and legend, or areas attributed with special or unique powers of sacredness. To ensure that Native American culture is not lost, it is essential for Indians to have continued access to traditional sacred places, many of which are located on lands now owned by non-Indians or are under control of various public authorities."

Pursuant to PRC §5097.9 and where feasible and appropriate, Caltrans ensures Native American access to such sites described above when they are located on Caltrans-owned land or are traversed by a State highway.

Caltrans has a program to identify gathering locations within and adjacent to the Caltrans right-of-way and a policy to prohibit herbicides in these areas. Caltrans Maintenance, where possible, is willing to work out trimming plans that will assist in stimulating the necessary plant growth. Each District has Landscape Specialists who contact local Native Americans to discuss gathering and issue permits. This program undergoes an annual review process resulting in an Annual Vegetation Control Plan.

3-5.7 CONFIDENTIALITY

The issue of confidentiality has two sides. On one side, Native Americans are often reluctant to reveal the location of a sacred or traditionally important site for a variety of reasons. Reasons may be a belief that revelation may bring harm to that site or to the person who revealed the site's location, or would reveal the location of a scarce and precious resource to a competing interest. For instance, some basketweavers do not reveal the location of their gathering locations even to other basketweavers. On the other side, however, these sites cannot be protected if their existence is not known.

Although state and federal laws provide for protecting the confidentiality of this information, the only iron clad guarantee that an agency can make that the information will not be revealed is if it is never obtained in the first place. Therefore, if at all possible within the restraints of a given project, Districts need to develop innovative and flexible approaches to identify areas that should be avoided without the requirement for complete location information. DNACs need to work with design engineers to on approaches that would successfully avoid these sensitive locations. If this is not possible, Districts must

make every effort to ensure the confidentiality of obtained information is only disclosed on a "need to know" basis, including the exact locations of burials, or sacred, ceremonial or religious places.

Section 304 of the NHPA states that federal agencies can withhold from public disclosure information on the location, character, or ownership of a historic resource if that disclosure may cause a significant invasion of privacy, risk harm to the resource, or would impede the use of a traditional religious site by practitioners. When that information is developed to comply with Sections 106 or 110(f) of the NHPA, the Secretary of the Interior must consult with the ACHP concerning disclosure and who may or may not have access to that information.

The records of Native American graves, cemeteries, and sacred places maintained by the NAHC and records that relate to archaeological site information are exempt from public disclosure (California Government Code §6254(r) and §6254.10).

3-5.8 POSSESSION, CURATION, AND DISPLAY OF ARTIFACTS

It is Caltrans' policy not to obtain human remains and associated grave artifacts, sacred objects or objects of cultural patrimony. **Human remains and associated grave artifacts recovered from state lands are respectfully treated and disposed of according to the wishes of the Most Likely Descendent**, whether the human remains and associated artifacts are discovered during fieldwork or post-fieldwork in the laboratory or during construction. On private lands and upon consideration of the Most Likely Descendant's recommendations, the landowner determines the respectful treatment and disposition of the human remains and associated grave artifacts.

For remains discovered during construction or other activities, the DNAC notifies the NAHC, obtains the name of the Most Likely Descendent if no one has been previously designated, and contacts the Most Likely Descendent.

Following NAGPRA regulations, FHWA and Caltrans give custody of human remains and funerary objects discovered on federal or tribal lands to the known lineal descendent(s), or if lineal descendants are not known, in a specified order of priority. That order is with

- (a) the Indian tribe if discovered on tribal land;
- (b) the tribe that can show the closest cultural affiliation;
- (c) the Indian tribe aboriginally occupying the land; or
- (d) the tribe that can show a stronger cultural relationship.

As defined in the NAGPRA regulations, the appropriate tribe determines the treatment and disposition of the human remains. This is usually outlined in a pre-excavation Action Plan that was developed as a result of consultation.

It is Caltrans' policy to ensure that the appropriate traditional cultural leaders and group determine the treatment and disposition of sacred objects and objects of cultural patrimony, as defined by NAGPRA. Although not covered by state law, sacred objects and objects of cultural patrimony, and the collections of which they are a part will not be accepted for curation by curatorial facilities subject to NAGPRA regulations. Caltrans, therefore, repatriates sacred objects and objects of cultural patrimony. The custody of sacred objects and objects of cultural patrimony recovered from federal or tribal lands follows the order of priority specified above, and their treatment and disposition is also outlined in a NAGPRA Action Plan.

For all other cultural artifacts retrieved during Caltrans excavations, it is Caltrans' policy to ensure that the collections are properly curated following the federal curation regulations (36 CFR §79), for collections obtained from federal land under an ARPA permit, and following the State Historical Resources Commission's guidelines for all other collections. Caltrans will consult with appropriate Native American groups regarding such curation plans, as outlined in 36 CFR §800. Caltrans seeks public, private, or Native American maintained repositories that provide secure permanent storage and ready access to users.

Caltrans will not display disinterred skeletal remains, grave artifacts, or other objects that Native Americans regard as traditionally sacred.

The appropriate Native American group must grant approval for the use of any photographs and detailed drawings of human skeletal remains, associated grave goods or sacred objects prior to their public display, or use for interpretive or reporting purposes. The documentation of human remains should be included as a separate appendix to the main body of a report and should not be available for public distribution unless there is a scientific or cultural interest and when the Native Americans agree to publication.

3-6 PROCEDURES

Use the following procedures to

- comply with state and federal laws, regulations and guidelines regarding Native American cultural concerns;
- ensure Native American participation in the Section 106 process; and
- identify cultural resources within Caltrans right of way that Caltrans will

seek to protect.

The procedures include those for consultation, hiring monitors, and discovery of human remains during any Caltrans activities.

District Cultural Resources staff or District Native American Coordinator generally handles Native American coordination rather than Caltrans consultants. This avoids putting the consultant in a position of having to justify the Caltrans project or having to speak for Caltrans on issues of a sensitive nature. A consultant, however, is not precluded from coordination if district staff judge this to be appropriate.

For all projects that have the potential to affect resources of concern to Native Americans, the DNAC ensures that the NAHC is notified of the proposed project by form letter (**Exhibit** __ to be inserted later). The NAHC will refer to the Sacred Lands Inventory file and notify the District within xxx weeks if they have a record of a sacred land within the proposed project's Area of Potential Effects (APE). Caltrans' efforts to consult Native Americans and the results of that consultation must be summarized in the Section 106 documents used to document identification, evaluation, or treatment of archaeological sites or Traditional Cultural Properties.

3-6.1 CONSULTATION

Consultation means that FHWA or Caltrans acting on its behalf actually confers with the tribes and interested persons on the proposed project and its potential for impacts on cultural resources within the project APE. Caltrans communicates any changes in the project APE to the tribes and interested persons. This may require renewed consultation if some time has passed. Caltrans can initiate consultation by any means for instance, by letter, telephone call, and personal visit or by a semi-annual notice. If there is no response to the initial contact, a telephone call or personal visit should be made. The amount of effort to consult should reflect the scope of the project and the degree of cultural sensitivity of the project APE. A phone call may be adequate. Other projects may involve more intensive and extensive consultation. The Districts should consider contracting with an ethnographer, if it appears appropriate to do so, if the project is complex or there are Native American issues.

The DNAC must keep a record of consultation, noting

- ❖ who was involved,
- ❖ when and where it took place,
- ❖ what was discussed.

Other staff members must ensure that they inform the DNAC of all consultation efforts.

Successful consultation with tribal leaders, traditional leaders or elders often requires personal visits. A field review of high sensitivity project areas with

representatives from the local Native American community may be necessary. In general, these reviews enhance the District's sensitivity to traditional values and land use practices, as well as sensitivity to features that are not readily apparent to the archaeologist or documented in the historic or ethnographic literature.

When consulting, Caltrans staff shall keep in mind cultural events that may be occurring throughout the year, as well the need for tribal groups to meet and discuss any information provided them or requested from them. These activities may delay a response. Also many tribal members or Native American consultants work on tribal business with Caltrans and other agencies in addition to their regular occupations, and cannot respond within short time frames that agencies have frequently tried to impose on them.

Districts should strive to develop optimal relationships by talking to tribal leaders and other Native American groups and individuals and establish with them how best to consult. Each tribe, group, or individual has different protocols for interacting with agencies. These efforts, although perhaps extensive or intensive in the short run, should ultimately develop a good trust relationship and smooth the way for both Caltrans and the tribe and other consulting parties * in future consultations.

Consultation means communicating to the Native Americans the purpose of the project, archaeological survey results, proposed excavations, and excavation results. Their concerns regarding historic properties or other cultural resources in the project area are solicited. Efforts should be made to work around their concerns if confidentiality is an issue, as discussed in Section 3.5-7. Caltrans provides documents upon request.

The consultation record must be included, or referenced if confidentiality is an issue, in Historic Property Survey Reports, subsequent 106 documents, and environmental documents as appropriate.

3-6.2 OBTAINING A MONITOR

The NAHC will assist Caltrans in providing information about the appropriate tribal group and traditional cultural leaders for specified areas, but will not recommend any individuals for monitoring positions. Each DNAC should develop a list of tribes, groups, or individuals known to have a cultural affinity within the Districts' territory. Sources of information for this list include the NAHC, Native American organizations and agencies, other Federal or state agencies, other DNACS, and the Field Directory of the California Indian Community (CDHCD 1996) and updates.

3-6.3 HIRING A MONITOR

Caltrans has a sole source authorization/advertising exemption for contracting with Native Americans to monitor archaeological excavations and construction when appropriate. Caltrans generally hires Monitors through the “non-credit card process,” formerly known as a “confirming service contract process” or through a regular service contract.

The former process can be used if payment does not exceed \$999.99 per contract, and does not exceed a total of \$5000 per year for a single vendor or service. Paperwork is essentially limited to the Monitor filling out a drug free workplace form and a vendor form, and subsequently submitting invoices for work completed. If the work will exceed the \$999.99 limit, a regular service contract is needed. These contracts take up to a month to put in place. Native American contracts are specifically exempted from the requirements for competitive bidding on contracts. Costs should be charged to the project for which the Monitor is hired.

The job description, procedures, and expectations may be outlined in a monitoring agreement (**Exhibit __** to be inserted later).

The DNAC or lead project person approves any timesheets and travel expense claims submitted by the monitor, submits them to the accounting office, and ensures payment in a timely fashion. As with all contractors, unsatisfactory performance is documented and reported to the DEBC.

3-6.4 HUMAN REMAINS/ASSOCIATED ARTIFACTS

The following steps are to be followed when human remains, including disarticulated bone, are encountered during an archaeological excavation, construction, maintenance or encroachment permit work on state owned land. These steps can be included as stipulations in contract specifications.

Caltrans shall

- ❑ Cease work in the vicinity of the human remains.
- ❑ The lead person on the project (for instance, field director, resident engineer, maintenance supervisor, or permit engineer) ensures that the DEBC or DNAC is immediately contacted.
- ❑ The lead person, DEBC or DNAC telephones the Coroner and the NAHC. Although the coroner has the ultimate responsibility to contact the NAHC, the Caltrans calls the NAHC at this time to provide them with information on the discovery, and to assure them that appropriate action is being taken. Coroner may or may not inspect the remains. If the coroner inspects the

remains and determines that the remains are not Native American and/or are determined to be a result of wrongful death, the coroner may either take possession of the remains for further inquiry, release them to next of kin, or order the body to be reinterred. After the above action, work may resume on the excavation project.

- ❑ If the Coroner determines that the remains are Native American, the Coroner notifies the NAHC of the findings. The NAHC immediately notifies the Most Likely Descendent.
- ❑ The Most Likely Descendant inspects the remains and makes a recommendation to the lead person on the treatment of remains and associated grave goods.
- ❑ The lead person ensures that the recommendations are followed. After the appropriate actions are taken, the excavation work may resume.